



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1121]

Certain Earpiece Devices and Components Thereof; Commission Determination to Review In Part an Initial Determination Granting In Part a Motion for Summary Determination of a Section 337 Violation; Schedule for Filing Written Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 16) granting in part a summary determination on violation of section 337 by certain defaulting and non-participating respondents in the above-captioned investigation. The Commission is requesting written submissions from the parties on an issue under review, and requests briefing from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, telephone (202) 205-2392. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS)

at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 29, 2018, based on a complaint filed on behalf of Bose Corporation of Framingham, Massachusetts ("Bose"). 83 FR 30,776 (Jun. 29, 2018). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337") based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain earpiece devices and components thereof by reason of infringement of one or more claims of U.S. Patent Nos. 9,036,852 ("the '852 patent"); 9,036,853 ("the '853 patent"); 9,042,590 ("the '590 patent"); 8,311,253 ("the '253 patent"); 8,249,287 ("the '287 patent"); and 9,398,364 ("the '364 patent"). The '852, '853, '590, '253, and '287 patents are herein referred to as the StayHear® Patents. The complaint further alleges that an industry in the United States exists as required by section 337.

The notice of investigation named fourteen respondents: (1) 1MORE USA, Inc. of San Diego, California; (2) APSkins of Seattle, Washington; (3) Beebo Online Limited ("Beebo") of North Las Vegas, Nevada; (4) iHip of Edison, New Jersey; (5) LMZT LLC of Brooklyn, New York; (6) Misodiko of ShenZhen, GuangDong, China; (7) Phaiser LLC of Houston, Texas; (8) Phonete of Shenzhen, China; (9) REVJAMS of New York, New York; (10) SMARTOMI Products, Inc. of Ontario, California; (11) Spigen, Inc. of Irvine, California; (12) Sudio AB of Stockholm, Sweden; (13) Sunvalley Tek International, Inc. of Fremont, California; and (14) TomRich of Shenzhen, China. The Office of Unfair Import Investigations ("OUII") was also named as a party in this investigation.

On October 4, 2018, Bose moved to amend the notice of investigation and for leave to file an amended complaint in order, among other things, (i) to correct the name of respondent iHip to Zeikos, Inc.; and (ii) to correct the name and address of respondent SMARTOMI Products, Inc. to V4ink, Inc. On October 29, 2018, the ALJ granted the motion. *See* Order No. 10 (Oct. 29, 2018), *not rev'd by* Comm'n Notice (Nov. 23, 2018); 83 FR 61168 (Nov. 28, 2018); 83 FR 62900 (Dec. 6, 2018). Bose filed and served its amended complaint on February 21, 2019.

During the course of the investigation, Bose settled with the following respondents: APSkins; Zeikos, Inc.; LMZT LLC; Spigen, Inc.; Sudio AB; and Sunvalley Tek International, Inc. *See* Order Nos. 8 and 9 (Oct. 19, 2018), *not rev'd by* Comm'n Notice (Nov. 9, 2018); Order No. 11 (Oct. 29, 2018), *not rev'd by* Comm'n Notice (Nov. 27, 2018); Order No. 12 (Nov. 26, 2018), *not rev'd by* Comm'n Notice (Dec. 19, 2018); Order Nos. 14 and 15 (Feb. 21, 2019), *not rev'd by* Comm'n Notice (Mar. 11, 2019). In addition, with the exception of Spigen, Inc., consent orders were issued against all of these respondents. *Id.* Thus, the investigation has been terminated with respect to these six respondents.

Five other respondents have been found in default pursuant to Commission Rule 210.16, 19 CFR 210.16: Beebo; Misodiko; Phaiser LLC; V4ink, Inc.; and TomRich (collectively, "the Defaulting Respondents"). *See* Order No. 7 (Sep. 20, 2018); Order No. 13 (Dec. 11, 2018), *not rev'd by* Comm'n Notice (Dec. 21, 2018).

On February 8, 2019, Bose moved for summary determination of a violation of section 337. Bose filed a corrected motion on March 1, 2019. Thereafter, Bose filed several replacement exhibits and a supplemental index.

The remaining three respondents, 1MORE USA, Inc., Phonete, and REVJAMS (collectively “the Non-Participating Respondents”), have not submitted any response, appeared, or otherwise participated in the investigation despite being served with the complaint or amended complaint, and the motion for summary determination of violation. The three Non-Participating Respondents and the five Defaulting Respondents were the subject of Bose’s motion for summary determination of a violation of section 337. On March 22, 2019, OUII filed a response supporting Bose’s motion in substantial part and supporting the requested remedy of a general exclusion order.

On June 28, 2019, the ALJ issued the subject ID and his Recommended Determination (“RD”) on remedy and bonding. The ID grants in part Bose’s motion for summary determination of a violation of section 337. Specifically, the ALJ found, *inter alia*, that Bose established that the importation requirement is satisfied as to each Defaulting Respondent and Non-Participating Respondent and each accused product; that other than infringement of claim 7 of the ’852 patent with respect to the Misodiko, Phonete, and TomRich products, Bose established infringement of claims 1 and 7 of the ’852 patent; claims 1 and 8 of the ’853 patent; claims 1 and 6 of the ’590 patent; claim 1 of the ’253 patent; claims 1, 7, and 8 of the ’287 patent; and claims 1 and 11 of the ’364 patent; and that Bose satisfied the domestic industry requirement for each asserted patent. In addition, the ALJ recommended that the Commission issue a general exclusion order, cease and desist orders, and impose a 100 percent bond during the period of Presidential review.

No petitions for review were filed.

Having reviewed the record of this investigation, including the ID, the Commission has

determined to review the ID in part. Specifically, the Commission has determined to review the following findings, which were based on the substantial, reliable, and probative evidence standard: (1) the ID's finding that Bose has established infringement of claim 7 of the '852 patent with respect to Beebo's Dodocool Earhooks, and, on review, reverse that finding; (2) the ID's finding that Bose has satisfied the economic prong of the domestic industry requirement under sections 337(a)(3)(A) and (B) with respect to the '364 patent; and (3) the ID's finding that Bose has satisfied the economic prong of the domestic industry requirement under section 337(a)(3)(C) with respect to the asserted patents, and, on review, take no position on that finding. The Commission has determined not to review the remainder of the ID. Accordingly, the Commission finds a violation of section 337 by reason of infringement of claims 1 and 7 of the '852 patent; claims 1 and 8 of the '853 patent; claims 1 and 6 of the '590 patent; claim 1 of the '253 patent; and claims 1, 7, and 8 of the '287 patent; and the satisfaction of the domestic industry requirement under sections 337(a)(3)(A) and (B) with respect to the StayHear® Patents.

The parties are requested to brief their positions on only the following issue under review.

1. The record evidence shows that Bose aggregated its domestic investments in Fiscal Year 2018 for domestic industry products that practice the StayHear® Patents and the '364 patent to establish a domestic industry under sections 337(a)(3)(A) and (B). Bose, however, relies on a subset of its domestic industry products to satisfy the domestic industry requirement with respect to the '364 patent. Please provide an appropriate allocation of the domestic investments and discuss whether such allocated investments establish a domestic industry under sections 337(a)(3)(A) and (B) with respect to the '364 patent.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue cease and desist order(s) that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (Dec. 1994). In addition, if a party seeks issuance of any cease and desist orders, the written submissions should address that request in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainant seeks a cease and desist order against a respondent, the written submissions should respond to the following requests:

1. Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainant also relies on other significant domestic operations that

- could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.
2. In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.
 3. Please explain with citation to the record whether respondents 1MORE USA, Inc., Phonete, and REVJAMS satisfy the requirements of subsections (A)-(E) of section 337(g)(1). *See* SD at 4.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount

determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

Complainant and OUII are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the dates that the asserted patents expire, the HTSUS numbers under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The written submissions and proposed remedial orders must be filed no later than close of business on **August 28, 2019**. Reply submissions must be filed no later than the close of business on **September 5, 2019**. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to Commission Rule 210.4(f), 19 C.F.R. 210.4(f). Submissions should refer to the investigation number (Inv. No. 337-TA-1121) in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Issued: August 14, 2019.

Lisa Barton,

Secretary to the Commission.

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